Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 71-947

UNITED STATES OF AMERICA

versus

FRANK LEO VUCI and
HENRY ANTHONY NOTO,

Petitioners

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana Baton Rouge Division

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the United States District Court for the Eastern District of Louisiana Baton Rouge Division

May It Please the Court:

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, rendered on the 30th day of November, 1971, in United States of America versus Frank Leo Vuci and Henry Anthony Noto, Number 71-2229 on the Docket of said court and the refusal of petitioners' application for rehearing an entry of said judgment on the 27th day of December, 1971, affirming the decision of the United States

District Court of the Eastern District of Louisiana, Baton Rouge Division, Criminal Number 1871 on the Docket of said court. The decision of the United States Court of Appeals for the Fifth Circuit is not reported at this time but said decision is appended hereto. Petitioners filed a petition for a Stay of Mandate with the Court of Appeals for the Fifth Circuit onthe 29th day of December, 1971 and said court ordered the Mandate be stayed pending application for Writ of Certiorari to this Honorable Court on or before the 26th day of January, 1972.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC 1254 (1) and 28 USC 1651 (a), petitioners requesting a review of a decision of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

I. Should a Judgment of Acquittal be granted where the Government does not prove that the alleged crime occurred within the jurisdiction of the Trial Court?

II. A. Should a Trial Court permit the Government to introduce into evidence, corporate income tax returns, against an individual defendant where the Government fails to prove that the defendant was an officer, agent, employee or stockholder of said corporation?

B. Should a new trial be granted where, over defendants' objections, the Trial Court allows corporate

income tax returns to be introduced into evidence, when said income tax returns viewed together with the Government's charts and estimates previously introduced into evidence was an attempt by the Government to prove the unrelated crime of income tax evasion?

III. Should a Judgment of Acquittal be granted where the Government fails to offer any proof to negate the testimony of its own witnesses that the unlawful state activity (bingo games), was conducted for the benefit of charitable sponsors?

IV. Should a new trial be granted where the Government, in its closing argument, appeals to bias and prejudice by implying that the Federal Government was forced to prosecute criminals, such as defendants, since state and local authorities would not institute criminal prosecution?

V. Should a new trial be granted where the Trial Court allows the Government to introduce evidence of gambling by Blackjack and slot machines where the indictment alleges only that defendants engaged in a lottery and bookmaking in violation of Louisiana law?

VI. Were the defendants' constitutional rights against self-incrimination, as espoused by the Fifth Amendment to the United States Constitution, violated when the Trial Court allowed the Government to introduce into evidence business records secured from the defendants pursuant to the execution of a search warrant?

VII. Were the acts allegedly performed by the defendants

such that they violated the intent and spirit of 18 USC 1952?

VIII. Do 18 USC 1955 and 18 USC 1961 (act October 15, 1970, Public Law 91-452) amend or repeal 18 USC 1952?

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. **18 USC 1952**

"Interstate and foreign travel or transportation in aid of racketeering enterprises.—

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor

on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasurer."

2. **18 USC 371**

"Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

3. **18 USC 2**

"Principals. (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which is directly performed by him or another would be an

offense against the United States, is punishable as a principal."

4. **18 USC 1955**

"(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of 1954, as amended (26 § 501 (c)(3), if no part of the gross receipts derived from such activity inures to the benefit of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity."

5. **18 USC 1961**

"Definitions.—As used in this chapter (§§ 1961-1968 of this title)—

"(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year."

6. **La. RS 14:90**

"Gambling—Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

"Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both."

STATEMENT OF THE CASE

A Federal Grand Jury meeting in New Orleans, Louisiana returned and filed on the 20th day of January, 1970, a four count indictment against appellants, Frank Leo Vuci, Henry Anthony Noto and Haskel F. Jones. Count one of the indictment charges that Vuci, Noto and Jones conspired to violate Title 18 USC 1952, 371, 2 and alleges that the defendants engaged in a gambling business enterprise involving a lottery and bookmaking in the Eastern District of Louisiana, in violation of the laws of the State of Louisiana; that an interstate facility would be used by the defendant and gambling paraphernalia would be sent from the State of Colorado to the Eastern District of Louisiana. It also lists seven overt acts which the defendants allegedly performed in furtherance of the conspiracy, three of which are the same acts alleged in counts two, three and four of the indictment.

Defendant, Haskel F. Jones, was charged in only count one and count four of the indictment whereas defendants, Vuci and Noto, were charged in all four counts of the indictment.

Count two of the indictment charges defendants, Vuci and Noto, with a substantive violation of Title 18 USC Sections 1952 and 2 in that they, in June, 1967, used an interstate facility with intent to promote, establish, carry on or facilitate an unlawful activity in the State of Louisiana. The unlawful activity was defined as a lottery in violation of the laws of the State of Louisiana.

Count three of the indictment charges defendants, Vuci and Noto, with a substantive violation of Title 18 USC Sections 1952 and 2 in that in February, 1967, they did use an

interstate facility between the Eastern District of Louisiana and the State of Colorado to promote or facilitate an unlawful activity in the State of Louisiana. The unlawful acivity was described as a lottery.

Count four of the indictment alleges that in January, 1969, defendants, Vuci, Noto and Jones, did knowingly use an interstate facility between the Eastern District of Louisiana and the State of Colorado to promote or facilitate an unlawful activity in the State of Louisiana in violation of Title 18 USC Sections 1952 and 2. The unlawful business enterprise was described as a lottery.

On the 30th day of March, 1971, the trial began with the selection of the Jury. The Government presented its case and rested. The defendants, out of the presence of the Jury, moved for a Judgment of Acquittal which was denied by the Trial Court. The defendants did not present any testimony after the Government rested its case. After argument and instructions by the Court, the Jury, on March 31, 1971, returned its verdict of not guilty as to defendant, Haskel F. Jones, and returned a verdict of guilty as charged as to defendants, Frank Leo Vuci and Henry Anthony Noto, on all four counts of the indictment.

Appellants, in due course, filed an original and supplemental motion for Judgment of Acquittal or New Trial. The Trial Court, after argument, denied Appellants' motions on the 21st day of May, 1971.

Defendant, Frank Leo Vuci, on the 21st day of May, 1971, was sentenced to five years in prison on count one and a fine of $10,000.00, and five years in prison on counts 2, 3

and 4 to run concurrently with the count one sentence. The court sentenced defendant Henry Anthony Noto to three years in prison and a fine of $5,000.00 on count one of the indictment and three years imprisonment on counts 2, 3 and 4 to run concurrently with the sentence imposed in court one. The execution of the sentence as to the imprisonment was suspended pending appeal.

Defendants filed a Notice of Appeal with the trial court on May 26, 1971 which, in due course, was perfected to the Court of Appeals for the Fifth Circuit.

The Court of Appeals for the Fifth Circuit on the 30th day of November, 1971 handed down its ruling affirming the trial court without opinion. Petitioners timely filed application for rehearing which was also denied by the Court of Appeals for the Fifth Circuit on the 27th day of December, 1971. The Mandate was stayed until the 26th day of January, 1972 pending petitioners' application for Writ of Certiorari to this Honorable Court.

ARGUMENT

I. A JUDGMENT OF ACQUITTAL SHOULD BE GRANTED WHERE THE GOVERNMENT DOES NOT PROVE THAT THE ALLEGED CRIME OCCURRED WITHIN THE JURISDICTION OF THE TRIAL COURT.

Defendants, Frank Leo Vuci and Henry Anthony Noto, hereinafter referred to only as defendants, unless a defendant is expressly identified separately, were charged in a four count indictment with having violated Title 18 USC Sections 1952, 371 and 2. Unless specifically enumerated, defendants' argument will be directed to all four counts of the indictment.

The Government introduced proof attempting to show that the defendants were engaged in the business of gambling at the Club Louisiane in violation of the laws of Louisiana and that they entered interstate commerce in an attempt to facilitate their alleged unlawful gambling business. The defendants relied upon the legal and constitutional maxim that all men are presumed innocent until proven guilty beyond a reasonable doubt and did not call any witnesses to testify on their behalf.

It is fundamental law that the Government must prove the guilt of a defendant beyond any reasonable doubt. The Government must also prove each and every essential element of the crime for which a defendant is charged. One of the essential elements which the Government must prove in every criminal prosecution is that the crime occurred within the jurisdiction of the Court. Proof of venue in the United States District Court for the Eastern District of Louisiana was essential to its having jurisdiction over the charges against defendants. Proof of venue or jurisdiction is not a procedural matter since it is contained in the following provisions of the United States Constitution:

> "The trial of all crimes, except in cases of impeachment, shall be by Jury; and such trials shall be held in the state where the crime shall have been committed."
>
> U. S. Constitution Article 3: Section 2 Clause 3
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district, wherein the crime shall have been committed . . ."
>
> U. S. Constitution Amendment 4.

It has been held that the above constitutional provisions concerning venue cannot be dispensed with as merely procedural or technical.

Travis v. United States, 364 US 631, 81 Sup.Ct. 358

Serio v. United States, 377 Fed. 2d 936 (1967)

United States v. Johnson, 323 US 273, 65 Sup.Ct. 249

Counsel for defendants has examined the appendix containing the transcript of defendants' trial and has found no proof of record that the crimes for which defendants are charged occurred within the jurisdiction of the United States District Court of the Eastern District of Louisiana. The only proof of venue occurred in the testimony of F.B.I. Agents Hardison and Butz. Agent Hardison testified in response to a question by the Government's attorney concerning the location of Club Louisiane:

Q. "And where is that located?"

A. "That is on Highway 190 West, in Port Allen, I believe it is."

(AP 97)

Agent Butz in response to the question by the Government, as to the location of Club Louisiane stated:

Q. "And where is that Sir?"

A. "In Port Allen on U.S. Highway 190."

(AP 130)

For this court to take judicial notice that the Club Louisiane is located in the Eastern District of Louisiana, a number of questions must be answered. It must conclude that U. S. Highway 190 is located exclusively within the territorial jurisdiction of the United States District Court for the Eastern District of Louisiana. This, of course, is impossible, since U. S. Highway 190 is a heavily traveled U. S. Highway spanning easterly and westerly far outside the Eastern District of Louisiana. This court is also faced with the problem that U. S. Highway 190 does not pass through the City of Port Allen, Louisiana. The court should take judicial notice of the boundaries of the City of Port Allen, Louisiana since its territorial limits are enumerated in an amendment to its Articles of Incorporation of record with the Clerk of Court and Recorder for the Parish of West Baton Rouge, Louisiana, recorded February 12, 1970 in Conveyance Book 110 Entry No. 1. These amended Articles of Incorporation are also a matter of public record having been filed with the Office of the Secretary of State for the State of Louisiana. These records show that U. S. Highway 190 is not immediately adjacent to nor does it traverse the limits of the City of Port Allen, Louisiana.

The court can take judicial notice of the location and boundaries of an incorporated city, such as Port Allen, Louisiana and the location of U. S. Highway 190.

Weaver v. U. S., 298 Fed. 2d 496 (5th Cir. 1962)

U. S. v. Harris, 331 Fed. 2d 600 (1964)

Rutherford v. U. S., 264 Fed. 2d 180

The testimony and evidence introduced at the trial of

this matter are in direct conflict as to the location of defendants' alleged gambling establishment. The testimony was to the effect that the gambling establishment where the crime was allegedly consummated was located in Port Allen, Louisiana on U. S. Highway 190. This, of course, is a factual impossibility since U. S. Highway 190 does not traverse nor is it immediately adjacent to Port Allen, Louisiana.

The reference to a certain street or highway, without more, in the absence of identification of the city has been held insufficient to prove venue.

U. S. v. Jones, 174 Fed. 2d 746

U. S. v. Brown, 225 Fed. 2d 751

U. S. v. Mendell, 447 Fed. 2d 639

It is submitted that the court should enter a Judgment of Acquittal herein since the Government completely failed to prove that the crimes for which the defendants are charged took place within the jurisdiction of the trial court.

II.A. THE TRIAL COURT SHOULD NOT PERMIT THE GOVERNMENT TO INTRODUCE INTO EVIDENCE CORPORATE INCOME TAX RETURNS AGAINST AN INDIVIDUAL DEFENDANT WHERE THE GOVERNMENT FAILED TO PROVE THAT THE DEFENDANT WAS AN OFFICER, AGENT, EMPLOYEE OR STOCKHOLDER OF SAID CORPORATION.

B. A NEW TRIAL SHOULD BE GRANTED WHERE, OVER DEFENDANTS' OBJECTIONS, THE TRIAL COURT ALLOWED CORPORATE INCOME TAX

RETURNS TO BE INTRODUCED INTO EVIDENCE WHEN SAID INCOME TAX RETURNS VIEWED TOGETHER WITH THE GOVERNMENT'S CHARTS AND ESTIMATES PREVIOUSLY INTRODUCED INTO EVIDENCE WAS AN ATTEMPT BY THE GOVERNMENT TO PROVE THE UNRELATED CRIME OF INCOME TAX EVASION.

(A.) The Government, over the objection of defendants, introduced corporate income tax returns of Westside Entertainment, Inc. for the tax years ending May 31, 1968 and May 31, 1969 (AP 290). The corporate income tax returns were certified copies under seal from the Internal Revenue Service. Copies of the corporate income tax returns had been furnished to counsel for defendants by the Government prior to trial and had been discussed at a pretrial conference with the trial court (AP 67-68). The defendants, prior to trial, had objected to the introduction of the corporate income tax returns and had, together with the Government, furnished the court with a trial memorandum concerning their admissibility. Counsel for defendants noted his previous objection when he objected to the introduction of the corporate income tax returns at the trial.

MR. D'AMICO: "If your Honor please, we want to make our objection to the introduction of the returns as we previously told the court, and we want to make that objection at this time."

(AP 290-291)

Defendants feel the corporate income tax returns should not have been admitted into evidence because no proof had been introduced showing either defendant to be an officer,

agent or stockholder of the corporation. Without the proper foundation or predicate, the corporate income tax returns were irrelevant and immaterial to the inquiry before the court. The introduction of such evidence wrongfully permitted the Jury to draw an inference based solely upon another inference. The Jury could infer that since defendant's name appeared on the corporate income tax returns, they must of necessity be an officer or stockholder of the corporation. It could then infer that since defendant's name appeared on the corporate income tax return, he signed or authorized someone to sign his name thereto. That since the defendant was an officer, agent or stockholder of the corporation and had signed the corporate income tax return which showed gambling income, he was guilty of violating 18 USC 1952 because illegal gambling was an element of the Federal violation for which the defendants were being tried. There was no proof of record that defendant signed the corporate income tax returns nor any proof that defendant was an officer, agent or stockholder of the corporation. Until at least one of these facts were established, the introduction of the corporate income tax returns was error since it allowed the Jury to conclude the guilt of the defendants from an inference based solely upon another inference.

Direct Sales Co. v. U. S., 319 US 703, 63 S.Ct. 1265

McNeely v. U. S., 353 F. 2d 913

(B.) The corporate income tax returns are further objectionable viewed in connection with the Government's charts and estimates involving defendants' alleged bingo operation introduced as "G-2, 3 & 4" (AP 122). The corporate tax returns list income from gaming, wagering, and bingo. Cov-

ernment Exhibit "G-2" (AP-122) shows the estimated number of customers who attended the bingo games at the Club Louisiane from July 3, 1968 to August 28, 1968. It also shows the estimated number of bingo cards purchased by each person together with the price charged for each bingo card. It seems obvious that any reasonably intelligent Jury could be expected to roughly calculate the amount of income which should be derived from the bingo operations per year ($386,689.60) if the Government's estimates were correct. The corporate income tax return "G-23" (AP-290) for the tax year ending May 31, 1969 lists bingo income as $19,775.30. Even without an exact calculation of the projected bingo income for the full year, it would be obvious to any juror that the bingo income was greatly understated on the corporate tax return, and indicated defendants were guilty of income tax evasion.

An almost identical problem was faced and thoroughly discussed by the Court of Appeals for the Fifth Circuit in *South v. U.S.*, 368 Fed. 2d 202, 205, 206 (5th Cir., 1966).

The Government in the Court of Appeals, relied upon *Grimes v. U. S.*, 379 Fed. 2d 791 (5th Cir.), for the proposition that the income tax returns were properly admitted in the defendant's trial. The court in *Grimes v. U. S.* (*Supra*) rejected Grimes' contention that the introduction of his income tax returns which showed his business as gaming was error. The court cited *U. S. v. Zizzo*, 338 Fed. 2d 577 (7th Cir.), as the authority for its overruling Grimes' contention. The court in *U. S. v. Zizzo* (*Supra*) was not faced with the question of admissibility of income tax returns but dealt with Federal Occupational Wagering tax returns. It is submitted that the *Zizzo* case was overruled by implication in 1968 when wagering tax returns were held to be nonadmissible.

Marchetti v. U. S., 390 U. S. 39, 88 Supreme Court 697 (1968)

Grosso v. U. S., 390 U. S. 62, 88 Supreme Court 716 (1968)

Haines v. U. S., 390 U. S. 85, 88 Supreme Court 772

Leary v. U. S., 395 U. S. 6, 89 Supreme Court 1532

U. S. v. Covington, 395 U. S. 57, 89 Supreme Court 1559

Nolan v. U. S., 395 Fed. 2d 283 (5th Cir.) 1968, 423 Fed. 2d 1031 (1970)

The court's pronouncement in *Grimes v. U. S.* as to the admissibility of income tax returns to show gambling was based upon erroneous authority. This fact, plus the decision of *Marchetti v. U. S.* (*Supra*) et al (cited above), shows that the court's pronouncements should be given no effect. See also *Courtney v. U. S.*, 390 Fed. 2d 521 (9th Cir.); *U. S. v. U. S. Coin and Currency*, 393 Fed. 2d 499 (7th Cir.), 91 S.Ct. 1041 (1971).

It is submitted that if the pronouncement in *South v. U. S.* (*Supra*) is applied, the court should reverse defendants' conviction since the corporate income tax returns viewed together with the Government's charts and estimates clearly was an attempt to prove an unrelated crime had been committed by defendants and unfairly prejudiced them with the Jury.

III. A JUDGMENT OF ACQUITTAL SHOULD BE GRANTED WHERE THE GOVERNMENT FAILS TO OFFER ANY PROOF TO NEGATE THE TESTIMONY OF ITS

OWN WITNESSES THAT THE UNLAWFUL STATE ACTIVITY (BINGO GAMES) WAS CONDUCTED WITHOUT PROFIT FOR THE BENEFIT OF CHARITABLE SPONSORS.

The Government, in an attempt to negate the fact that charitable bingo is legal in the State of Louisiana, called two witnesses in an attempt to show that the bingo game allegedly conducted by defendants was not a charity bingo game. The Government called Mr. Henry Gray, an officer of Port Allen Junior Chamber of Commerce, a charitable organization (AP-290), and called Mr. Joseph H. Bernard, an officer of the Brusly Lions Club, a charitable organization (AP-241). These witnesses established that their charitable organizations sponsored the bingo games allegedly conducted by defendants and that their Clubs received the sum of $150.00 per month as sponsors (AP-218 and AP-245). Gambling in Louisiana is prohibited by Louisiana Revised Statute 14:90. This statute provides in pertinent parts that gambling to be illegal must be conducted for a profit. If gambling is not conducted for a profit, there is no violation of the Louisiana law.

If the alleged gambling in this case was legal in the State of Louisiana, the Federal charges against the defendants must of necessity fall since 18 USC 1952 requires that interstate transportation be used in furtherance of a gambling operation, illegal under state law.

It is submitted that since the Government failed to offer proof to negate the testimony of its own witnesses, that the gambling operation involving a lottery or bingo was or could have been conducted for no profit, a Judgment of Acquittal should be entered.

IV. A NEW TRIAL SHOULD BE GRANTED WHERE THE GOVERNMENT, IN ITS CLOSING ARGUMENT, APPEALED TO BIAS AND PREJUDICE BY IMPLYING THAT THE FEDERAL GOVERNMENT WAS FORCED TO PROSECUTE CRIMINALS SUCH AS DEFENDANTS SINCE STATE AND LOCAL AUTHORITIES WOULD NOT INSTITUTE CRIMINAL PROSECUTION.

The Supreme Court in *Berger v. U. S.*, 295 U. S. 78, 55 Sup.Ct. 629, solidified the well known jurisprudential rule that a prosecuting attorney may not use improper methods to procure a conviction. Improper conduct would include appealing to bias or prejudice or ridiculing a defendant before the Jury.

The U. S. Attorney, in the instant case, in his closing argument said:

> "Ladies and gentlemen, I submit to you that you have but one alternative here. You took an oath as jurors to uphold the law, and if you want to wake up tomorrow morning and look yourselves in the mirror, look yourselves in the face, you will have to do your duty as jurors and uphold the law. If the State of Louisiana can't clean its own streets, then we will clean them for her. Find all three —"
>
> (AP-356)

It is submitted that such conduct was improper and requires the defendants be granted a new trial. The following case shows that courts have granted new trials because of similar misconduct.

U. S. v. Handman, 447 F.2d 853. (7th Cir.)

King v. U. S., 372 Fed. 2d 383 (DC)

V. IT WAS ERROR TO ALLOW THE GOVERNMENT TO INTRODUCE EVIDENCE OF GAMBLING BY BLACKJACK AND SLOT MACHINES WHERE THE INDICTMENT ALLEGES ONLY THAT DEFENDANTS ENGAGED IN A LOTTERY AND BOOKMAKING IN VIOLATION OF LOUISIANA LAW.

The court has discretion in determining whether to admit evidence of crimes other than that charged in the indictment. In the instant case the defendants feel that the court abused its discretion when it allowed the introduction of evidence concerning other crimes. The court allowed testimony as to gambling by means of slot machines and blackjack games (AP 115-119), which were acts of gambling other than that charged in the indictment. As more fully enumerated hereinabove, count one of the indictment alleged a conspiracy to violate Title 18 USC 1952 and the illegal activity was stated to be a lottery and bookmaking. Counts two, three and four of the indictment allege a substantive violation of 18 USC 1952 and specify the illegal activity as a lottery. Further, the Government, in answer to defendants' Bill of Particulars, stated that the state law violation was the conducting of an illegal lottery and bookmaking business (AP 30-33).

The defendants timely objected to the introduction of any evidence as to gambling other than the act of gambling specified in the indictment (AP 114). It seems clear from the testimony the Government introduced as to other gambling, that it was an attempt to show that defendants were big time or large scale professional gamblers and thereby prejudiced the Jury against the defendants. The evidence concerning other gambling did not strengthen the Government's case insofar as a violation of 18 USC 1952.

The court should exclude evidence of other crimes in a particular fact situation, such as in the instant case.

U. S. v. Gorman, 393 Fed. 2d 209, 219

> "As noted in McCormick on Evidence 152, three factors justifying exclusion of evidence are: danger of jury prejudice, danger of jury distraction by creation of side issues, and consumption of undue amount of trial time."

In *Thomas v. U. S.*, 376 Fed. 2d 564 (5th Cir.), the court reversed a conviction of the Federal crime of possession of a sawed-off shotgun because of the introduction of a chain and bullwhip seized with the shotgun. The court felt that this type evidence unjustly prejudiced the defendant since a chain and whip are items for which an average juror has hatred and scorn. A similar problem is present in the instant case since there has been great publicity concerning organized crime involving big time or extensive gambling.

U. S. v. Kearney, 420 Fed. 2d 17 (DC)

U. S. v. Rizzo, 418 Fed. 2d 71 (7th Cir.)

It is submitted that for the above and foregoing reasons the introduction of evidence of other gambling was error and requires that the court reverse defendants' conviction because of the likelihood of juror prejudice created by such testimony.

VI. THE DEFENDANTS' CONSTITUTIONAL RIGHTS AGAINST SELF INCRIMINATION, AS ESPOUSED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WERE VIOLATED WHEN

VI. THE TRIAL COURT ALLOWED THE GOVERNMENT TO INTRODUCE INTO EVIDENCE BUSINESS RECORDS SECURED FROM THE DEFENDANTS PURSUANT TO THE EXECUTION OF A SEARCH WARRANT.

The Government, in the trial court, introduced business records secured from defendants pursuant to the execution of a search warrant (AP 151-154). The introduction of these materials violated defendants' Fifth Amendment privilege against self incrimination since they could not have been secured from the defendant pursuant to a subpoena.

In *Hill v. Philpott*, 445 Fed. 2d 144 (7th Cir. 1971), the court held that such records were privileged and seizure pursuant to search warrant and their subsequent introduction at a trial violated defendant's Fifth Amendment privilege against self incrimination. If pronouncements in *Hill v. Philpott* (*Supra*) are to be given effect, the defendants should be granted a new trial.

VII. THE ACTS ALLEGEDLY PERFORMED BY THE DEFENDANTS DID NOT VIOLATE THE INTENT AND SPIRIT OF 18 USC 1952.

The Trial Court denied defendants' Motion for Judgment of Acquittal even though there was no proof introduced to show that defendants resided in one state while operating or managing an illegal activity located in another. The alleged conduct of defendants was not of such a nature as to be a violation of the intent and spirit of 18 USC 1952.

Rawls v. U. S., 91 Supreme Court, 1056, 1059

> "Legislative history of the Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another. . . ."

From the above it would seem that the defendants are not of that class of persons who should be subject to the express letter of the law governing the Travel Act, 18 USC 1952. There was no proof of record to show that defendants resided outside of the State of Louisiana and managed or operated an illegal activity within the State of Louisiana.

VIII. 18 USC 1955 AND 18 USC 1961, ACT OCTOBER 15, 1970, PUBLIC LAW 91-452 AMENDS OR REPEALS 18 USC 1952.

Defendants are charged with having violated Title 18, USC 1952 in that they used an interstate facility to promote a gambling business which was unlawful under State law. On October 15, 1970 Congress enacted an act, October 15, 1970, Public Law 91-452 which created Title 18, USC 1955 and 1961. Title 18, USC 1952 is a general statute amended by Public Law 87-228 September 13, 1961. 18 USC Sections 1955 and 1961 are late expressions of the legislative will of Congress. It is fundamental that a later act of Congress supersedes or repeals any older statutes which are in conflict therewith.

Title 18 USC 1955(e) provides that bingo games or lotteries are not a violation if no part of the gross receipts derived from the said activity inures to the benefit of any

private shareholder, member or employee of such organization, except as compensation for actual expenses incurred by him in the conduct of such business.

Title 18 USC 1961(1) defines racketeering activities as, " 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year."

There seems to be a conflict between 18 USC:1955 and 1961 and 18 USC:1952 insofar as they apply to the instant case. 18 USC:1961 states that racketeering activities, such as gambling, is not a federal crime unless it is chargeable under State law and punishable by imprisonment for more than one year. Under the laws of the State of Louisiana, Revised Statute 14:90 the maximum penalty that can be incurred for the crime of gambling is a sentence of imprisonment for not more than six months.

It is submitted that the later expression of the will of Congress should control and the Court should hold that 18 USC:1952 is amended or appealed by 18 USC, Section 1955 and Section 1961 insofar as it is in conflict therewith.

CONCLUSION

In conclusion, it is respectfully requested that a Writ of Certiorari be granted and after due consideration, a judgment

of acquittal be entered, or in the alternative, petitioners' conviction be reversed and they be granted a new trial.

Respectfully submitted:

D'AMICO, CURET & BUSH

By: _____

Sam J. D'Amico
610 Reymond Building
Baton Rouge, Louisiana 70801

By: _____

Bryan E. Bush, Jr.
610 Reymond Building
Baton Rouge, Louisiana 70801

CERTIFICATE

I HEREBY CERTIFY that copies of the above and foregoing petition has this day been served on the following by depositing same in the United States mail, postage prepaid:

1. United States Court of Appeals for the Fifth Circuit

2. United States District Court for the Eastern District of Louisiana, Baton Rouge Division

3. Mr. Robert L. Livingston, Jr. and
Mr. K. Eric Gleason
500 St. Louis Street
New Orleans, Louisiana 70130

Baton Rouge, Louisiana this day of January, 1972.

SAM J. D'AMICO

APPENDIX

United States Court of Appeals

For the Fifth Circuit

October Term 1971

No. 71-2229

E.D. Docket No. CR-4871

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK LEO VUCI and HENRY ANTHONY NOTO,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

November 30, 1971

Issued As Mandate:

In the

United States Court of Appeals

For the Fifth Circuit

No. 71-2229

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK LEO VUCI and HENRY ANTHONY NOTO,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(November 30, 1971)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

[1] See NLRB v. Amalgamated Clothing Workers of America, 430 F.2d 966 (5th Cir. 1970).

In the

United States Court of Appeals

For the Fifth Circuit

No. 71-2229

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK LEO VUCI and HENRY ANTHONY NOTO,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana

(December 27, 1971)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

United States Court of Appeals

Fifth Circuit

December 29, 1971

Mr. Bryan E. Bush, Jr.
Attorney at Law
Reymond Building
Baton Rouge, La.

No. 71-2229—U.S.A. v. Frank Leo Vuci and
Henry Anthony Noto

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(1) Appellants' Motion for Stay of Mandate.

(2) January 5, 1972.

Dear Sir:

I am authorized by this Court to advise that the above (1) has been received and filed, and under the rules and practice of this Court will be presented for ruling without oral argument on the date shown in column (2) above, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By: Carol A. Gaudet
Deputy Clerk

cc: Mr. Sam J. D'Amico
Mr. Gerald J. Gallinghouse
Mr. K. Eric Gisleson

This is only the date on which it is now expected that the matter will be forwarded for ruling and does not mean that this office will be able to advise counsel of the Court's action by then. Counsel should allow at least ten days' time thereafter for advice as to the Court's ruling before making inquiry.

United States Court of Appeals

Fifth Circuit

January 6, 1972

Messrs. Bryan E. Bush, Jr.
Sam J. D'Amico
Attorneys at Law
610 Reymond Bldg.
Baton Rouge, La.

No. 71-2229—U.S.A. vs Frank Leo Vuci and Henry Anthony Noto

MANDATE STAYED TO: January 26, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying

rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By: Claudette Staiger
Deputy Clerk

enc.
cc: Mr. Gerald J. Gallinghouse
Mr. K. Eric Gisleson

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No. 71-947

In the Supreme Court of the United States

OCTOBER TERM, 1971

FRANK LEE VUCI AND HENRY ANTHONY NOTO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

HENRY E. PETERSEN,
Assistant Attorney General,

ROGER A. PAULEY,
KENNETH L. GREENMAN, JR.,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-947

FRANK LEE VUCI AND HENRY ANTHONY NOTO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* order of the court of appeals (Pet. App. 28) is reported at 450 F. 2d 940.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27) was entered on November 30, 1971, and a petition for rehearing was denied on December 27, 1971

(Pet. App. 29). The petition for a writ of certiorari was filed on January 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish that a crime occurred within the jurisdiction of the trial court.

2. Whether the trial judge erred in admitting corporate tax returns for the purpose of showing the extent of petitioners' gambling operations.

3. Whether there was sufficient evidence to establish that the gambling was conducted for profit, in violation of state law.

4. Whether the government's closing argument was impermissibly prejudicial.

5. Whether evidence of gambling activities different from those set forth in the indictment was improperly admitted.

6. Whether admission of certain business records seized pursuant to a search warrant violated petitioners' Fifth Amendment privilege against self-incrimination.

7. Whether the statute under which petitioners were convicted was amended or repealed by subsequently enacted statutes.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners were convicted on three counts (Counts II, III,

IV) of having used interstate facilities to further illegal gambling, and one count (Count I) of having conspired to commit that substantive offense, in violation of 18 U.S.C. 1952 and 371.[1] Petitioner Vuci was sentenced to concurrent terms of five years' imprisonment and fined $10,000; petitioner Noto was sentenced to concurrent terms of three years' imprisonment and fined $5,000. The court of appeals affirmed (Pet. App. 28).

The evidence showed that for several years petitioners operated a gambling establishment at the Club Louisiane, located on Highway 190 near Port Allen, Louisiana (App. 130, 229-230, 250).[2] The gambling consisted of bookmaking (App. 133, 135, 233, 253-254), card games (App. 117), slot machines (App. 115, 256), and a large bingo operation ostensibly sponsored by civic groups but in fact inuring to the personal benefit of petitioners (App. 217-218, 244 and G.X. 10, 22, 23). Both petitioners, who were brothers-in-law, ran and managed the Club Louisiane (App. 231, 255-257 and G.X. 22, 23). Noto was the general manager of the Club and supervised the horse-betting operations (App. 231, 253, 255), while Vuci was the manager and hired Club personnel (App. 229-230, 252).

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[1] Co-defendant Haskell F. Jones, who was charged in Counts One and Four, was acquitted.

[2] "App." refers to the joint appendix filed in the court below containing the trial court transcript; "G.X." refers to the government's exhibits at trial.

In the course of operations, it was necessary to replenish the bingo equipment (G.X. 12). On January 28, 1967, Vuci ordered one electric bingo blower from Bingo King Co., Englewood, Colorado, in a handwritten letter bearing a Baton Rouge, Louisiana, postmark (App. 167-170 and G.X. 13 A-E). The blower was shipper by common carrier from Colorado to Port Allen, Louisiana, on February 14, 1967 (App. 169-170 and G.X. 13 A-E). Count III of the indictment was based on this transaction.

On June 26, 1967, Vuci telephoned from Louisiana to Bingo King in Colorado and ordered four thousand bingo cards, another blower, and a flashboard (App. 170-171). These items were shipped by common carrier from Colorado to the Club on June 30, 1967 (App. 172 and G.X. 14 A-D). A check endorsed by Vuci was mailed to Bingo King in payment for these items (App. 174-176 and G.X. 9). This transaction was the basis for Count II.

F.B.I. agents executed a search warrant at the Club on January 23, 1969, and seized eighteen telephones, betting slips, a sports blackboard ("tote board"), bingo equipment, and other gambling paraphernalia (App. 132-140 and G.X. 6). Slot machines were removed by the local sheriff (App. 137-138).

On January 24, 1969, co-defendant Haskell Jones' son called Bingo King from Louisiana and asked that Bingo King call his father (App. 203-204). Bingo King called Jones, who placed an order for 1500 bingo cards (App. 205 and G.X. 15 A-G). The cards were shipped by air freight to Jones Brothers in New Or-

leans, Louisiana (App. 265 and G.X. 15 A-G), and were picked up by petitioners' employee and promptly delivered to and used at the Club (App. 270). Count IV was based on this transaction.

ARGUMENT

1. Petitioners contend that the government failed to prove that the crime for which they were convicted occurred within the jurisdiction of the district court (Pet. 9-13). On the contrary, there was ample evidence on this point. F.B.I. Agent Hardison testified concerning the Club's location near Port Allen (App. 97, 100), as did Agent Butz (App. 130). Agent Butz also discussed the purported sponsorship of the bingo games by two civic groups in neighboring towns (App. 136). Other testimony concerned a call at the Club by the West Baton Rouge Parish Sheriff's Office (App. 138), and numerous additional witnesses described where the Club was situated (App. 217; 229, 244, 250). The Club's tax returns, which were admitted into evidence, show a Port Allen, Louisiana, address and a Baton Rouge, Louisiana, mailing address (G.X. 22, 23), and other documents and testimony showed that petitioners ordered and accepted interstate shipments in the court's district (App. 166-177, 212 and G.X. 13 A-E, 20, 9). The foregoing clearly established venue. See, *e.g.*, *United States* v. *Charlton*, 372 F. 2d 663 (C.A. 6), certiorari denied, 387 U.S. 936.

2. The Club's corporate income tax returns for fiscal years 1968 and 1969 were, contrary to petitioner's

contention (Pet. 14-17), properly admitted into evidence. The return for fiscal year 1968 was signed by Vuci as President and listed Noto as Treasurer, and showed "Machine Income" of $12,802.95, "Wagering Income" of $14,468, and "Bingo Income" of $20,362.77 (G.X. 22). The 1969 return was signed by Noto as Vice President and listed Vuci as President and majority stockholder; it stated that the principal business activity was "Booking & Club Oper." and reported "Machine Income" of $8,346.20, "Gaming Income" of $9,657.00, "Wagering Income" of $97,983.20, and "Bingo Income" of $19,775.30 (G.X. 23).

Petitioners' objection that there was no prior proof that either of them was an officer, agent or stockholder of the corporation is refuted by the record. There was extensive testimony concerning petitioners' operation of the Club, and the government's exhibits included numerous checks on the Club's account signed by petitioners (G.X. 7, 8) and a ledger book seized at the Club and setting forth its receipts and disbursements, including references to petitioners (G.X. 10).

Introduction of the tax returns was not, as petitioners claim, an attempt by the government to prove the unrelated crime of income tax evasion. The trial judge specifically instructed that petitioners were not charged with evasion of income tax and that the purpose of the returns was only to show the extent of the gambling operation (App. 291-292). The returns were plainly relevant to the offenses charged, since they confirmed petitioners' ownership of and partici-

pation in the Club, and showed the existence of a gambling business, the continuous nature of the gambling operation, and that the gambling was conducted for private financial gain and was part of a single cohesive program as alleged in the indictment and urged throughout the government's case. There was no error in using this evidence. Compare *United States* v. *Pauldino*, 443 F. 2d 1108, 1113 (C.A. 10).

3. There is nothing to the contention (Pet. 18) that petitioners' activities were not conducted for profit, but instead were charitable and therefore legal under Louisiana law and not subject to prosecution under federal law. Substantial evidence showed that the two civic organizations that purportedly sponsored the games were used as a "front" by petitioners. Those organizations had no way of knowing what the total proceeds of the bingo games were and did not manage or supervise the games (App. 248), and the income derived from the games far exceeded the amounts paid the organizations for their "sponsorship" (App. 96-130; 249-294; G.X. 10). And the Club's tax returns reflected a large income from bingo, and no deductions for charitable contributions to the civic organizations (G.X. 22, 23).

4. The statement by government attorneys during closing argument, referring to the lack of local prosecution of petitioners, does not, as they claim (Pet. 19), require a new trial. Defense counsel objected to the statement and the trial judge promptly instructed the jury to disregard it (App. 356). The judge also carefully instructed the jury concerning the weight to be

given to comments by counsel (App. 76, 301-302). In view of these instructions, there was no undue prejudice. Compare *United States* v. *Spino*, 345 F. 2d 372, 374 (C.A. 7), certiorari denied, 382 U.S. 825; *United States* v. *Zizzo*, 338 F. 2d 577, 581 (C.A. 7), certiorari denied, 381 U.S. 915.

5. The evidence relating to gambling at the Club Louisiane other than that specifically set forth in the indictment was properly admitted. This evidence showed that gambling by means of slot machines and blackjack games was conducted at the Club; it was relevant as tending to prove the existence of an illegal continuous business enterprise, as the statute (18 U.S.C. 1952) requires, and not just single instances of gambling. See *Spinelli* v. *United States*, 382 F. 2d 871, 892 (C.A. 8), reversed on other grounds, 393 U.S. 410.

6. Petitioners' claim, made here for the first time, that the admission of certain business records of the Club that had been seized pursuant to a search warrant violated their Fifth Amendment privilege against self-incrimination (Pet. 22), is without substance. The records included cancelled checks payable to the "sponsoring" civic organizations (App. 153-154 and G.X. 7, 8), a cancelled check payable to Bingo King (App. 156 and G.X. 9), and pages of the Club's ledger book indicating that funds covering the checks were disbursed (App. 156-157 and G.X. 10). These items were utilized in the operation of the illegal gambling venture and were instrumentalities of the crime charged. They are not testimonial or communicative

in nature, and their introduction therefore did not compel petitioners to become witnesses against themselves in violation of the Fifth Amendment. See *United States* v. *Hanon*, 428 F. 2d 101, 106-107 (C.A. 8), certiorari denied, 402 U.S. 952. Moreover, the records did not belong to petitioners but to a corporation, with respect to whose property petitioners are not entitled to assert the Fifth Amendment privilege against self-incrimination. Cf. *Donaldson* v. *United States*, 400 U.S. 517; *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.[3]

7. Petitioners' final contention (Pet. 23-24) is that 18 U.S.C. 1955 and 1961, enacted some twenty months after the offense charged and nine months after indictment, conflict with the statute under which they were convicted (18 U.S.C. 1952) and thus impliedly amend or repeal it. By its terms, the exclusion in Section 1955(e) does not cover this situation; while it excludes bingo games run by charitable organizations, petitioners' operation was conducted for their private benefit. And although Section 1961(1)(A) defines "racketeering activity" in terms that would not include petitioners' activities because of the penalty for them under Louisiana law, that definition is not used for Section 1952. Moreover, petitioners' dis-

[3] Petitioners' reliance on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, December 14, 1971, No. 71-442, this Term, is misplaced. Among other things, the records introduced in that case were not, like those here, corporate records. See also the government's Memorandum in Opposition in *Scharfman* v. *United States*, No. 71-710, this Term, certiorari denied, February 22, 1972.

cussion of Section 1961 is incomplete; Section 1961 (1)(B) adds that "racketeering activity" also includes any act which is indictable under 18 U.S.C. 1952, thus making clear that no implied amendment or repeal was intended.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
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ROGER A. PAULEY,
KENNETH L. GREENMAN, JR.,
Attorneys.

MARCH 1972.

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